

Virginia

Regulatory Hot Tip 2016 – 12

Professional Insurance Agents Association of Virginia and DC, Inc.

“DO YOU SOLEMNLY SWEAR...”

Given the purely hypothetical choice between (i) testifying under oath in a judicial proceeding, or (ii) undergoing a root canal procedure, many people would opt for the latter. Disclosing one’s knowledge of the facts in a dispute can be a daunting task. But, it need not overwhelm or frighten the witness.

Most of what this author has already contributed for publication here concerns legal issues arising *before* anyone actually testifies. The purpose of this article is to provide some guidance before anyone is placed under oath. Moreover, many of these points will also assist you with other aspects of your business, not just in prosecuting or defending against lawsuits. So, consider the following:

Preparation is key. Although there are rare instances where unrefreshed recollections or purposely maintained ignorance can be advantageous in a lawsuit,

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effective testimony begins with thorough preparation. Review your file, emails, notes, memoranda, letters and all other records. Speak with others with whom you were involved in the subject at hand. Go over your anticipated testimony with your lawyer if you have one. Rehearsals—yes, more than one—are extremely helpful and will acclimate you to the unique give-and-take of an examination.

Remember who the enemy is. The person posing the questions is your adversary. He is engaging in this process with one goal in mind—defeating you. Thus, never lose track of the examiner’s motives and objectives regardless of how innocent or engaging he may be during the process, and especially when off the record. The cup of coffee he offers you may contain arsenic. Never let your guard down.

Listen to the question. Effective testimony begins with listening to what is being asked. Make certain you have heard the question; do not hesitate to ask for it to be repeated. Even more importantly, make certain you have understood the question; do not hesitate to ask for it to be rephrased. Answering a question you do not fully understand can be disastrous. You can find yourself providing incorrect information on a key aspect of the proceedings.

Answer only the question. You may have heard it said of someone that if you ask him for the time, he will tell you how to make a clock. When testifying, give a truthful and complete answer, but do not feel obligated to go beyond the scope of what has been asked. Volunteering information is not required either legally or morally. If the examiner wishes to pursue more, he will do so. You do not need to assist him.

Do not guess or speculate. When you take your oath, you’re binding yourself to tell the truth about your recollection of the facts. You’re not obligated to guess or speculate about those facts. Guesswork is of no value and cannot be admitted over objection as evidence at trial. If you simply cannot resist the temptation of guessing or speculating, however, at least make it abundantly clear on the record that you are doing so. If you fail to do so, others attending the deposition will come away from the proceeding thinking that you have provided an accurate, *factual* response.

“I don’t know” and “I don’t remember” are permissible responses. No one knows or recalls everything about a particular dispute. The passage of time alone can dim memories. Nonetheless, many people feel embarrassed if they cannot provide a substantive answer to every question. If you do not recall—or never knew—the answer to a given question, then simply say so. Be mindful, however, that you cannot use this response as a means of dodging a problematic answer. A good examiner will eventually discover your untruthfulness, and you will suffer the consequences.

Breaks are permitted. Testifying is tiresome. If you need a moment's rest for any reason, simply say as much. You cannot maintain proper focus and continue to provide accurate answers if you are in need of a bathroom break or simply a time-out. The examiner might want you to conclude responding to a particular question or line of questioning, but he cannot hold you hostage for the entire session without reasonable relief.

Supplement if necessary. There are instances when you may recall something later during your testimony that you simply omitted when answering a question. Feel free to inform the examiner that you now wish to provide an answer or supplement your response. You have every right to be completely forthcoming even if it occurs later in your testimony.

Review the transcript. If the testimony is part of a deposition, it likely will be transcribed. Never waive the opportunity to read and supplement the transcript of your testimony. Court reporters cannot be counted upon always to properly record the questions and answers and other edits. Therefore, you can make corrections.

Keep these points in mind if you are ever unfortunate enough to receive a witness subpoena. They can prepare you for providing effective testimony while preventing you from being unnerved by the whole process. Perhaps when you are done, you will feel as if sitting in the dentist's chair would have been worse after all.